TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 33 | Number 2 Article 14

2017

The Wholesale Exclusion of Religion from Public Benefits Programs: Why the First Amendment Religion Clauses Must Take a Backseat to Equal Protection

Michael J. Borger

THE WHOLESALE EXCLUSION OF RELIGION FROM PUBLIC BENEFITS PROGRAMS: WHY THE FIRST AMENDMENT RELIGION CLAUSES MUST TAKE A BACKSEAT TO EQUAL PROTECTION

Michael J. Borger[*]

I. INTRODUCTION

The U.S. Supreme Court, throughout its history, has routinely been tasked with evaluating government action that has either encroached upon fundamental religious liberties or has come dangerously close to constituting the sponsorship of a particular religion.[1] Many of its opinions and dissents on these topics have been emotionally charged, conjuring up passionate viewpoints, contrasting ideologies, and powerful reminders of our nation's turbulent origins.[2] However, regardless of the justices' differing opinions regarding the appropriate method to analyze religious controversies, these cases have made it abundantly clear that the

[*]Juris Doctor Candidate, Touro College Jacob D. Fuchsberg Law Center, May 2018; B.A., Stony Brook University, 2014. I would like to express my sincere gratitude to Professor Gary M. Shaw for the invaluable support and guidance that he has given me on this note. His drive for excellence has given me the confidence to always pursue more. I would also like to thank Jessica Vogele for her superb editing and constant encouragement. Lastly, I would like to thank my parents, Linda and Joe, and my grandmother, Marie, for their unconditional love and support throughout my entire law school career.

[1] *See generally* Locke v. Davey, 540 U.S. 712 (2004) (holding that the state did not violate the Establishment Clause when it prohibited post-graduate theology students from receiving state funded scholarships even though they met the eligibility requirements for the program); Church of the Lukumi Babaku Aya v. City of Hialeah, 508 U.S. 520 (1993) (9-0 decision) (striking down an ordinance which prohibited religious animal sacrifices because it violated the Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the state violated the First Amendment when it disqualified an individual from receiving unemployment benefits because her religion did not permit her to work on Saturdays).

[2] Lee v. Weisman, 505 U.S. 577, 644-46 (1993) (Scalia J., dissenting) (calling the Court's treatment of religion as a "*jurisprudential disaster*" and heavily criticizing the majority for downplaying the significant role that religious freedom had in the formation of this Nation) (emphasis added).

paramount concern of the Court is to ensure that the First Amendment is not offended by the "evils" resulting from the commingling of church and state, a fear that dates back to the founding of America.[3]

Although the Supreme Court's First Amendment religion clause jurisprudence has been effective in protecting these fundamental religious liberty interests,[4] it is important not to overlook and undervalue other provisions of the U.S. Constitution that operate to safeguard an individual's right to life and liberty as well. In fact, in a sweeping effort by the Court to protect the First Amendment, arguments advanced by religious organizations that the state action violated the Equal Protection Clause typically fall by wayside, even when these challenges are meritorious. The following discussion will help to lay the foundation for this premise.

The Establishment Clause of the First Amendment is frequently invoked to evaluate the constitutionality of state-sponsored public benefits programs, where a state's treasury department has been authorized to issue grants, scholarships, and other forms of public assistance that are funded by tax dollars.[5] In the states' effort to avoid potential church and state entanglement issues arising from these types of public benefits programs, the states' respective statutes and constitutions frequently place "blanket prohibitions" on granting *any* public assistance to churches, religious organizations, or religiously-tied individuals due to their religious status.[6] This "wholesale exclusion of [religion]" occurs even where these applicants otherwise met the program's qualifying acceptance criteria and where the funds would be used for generally neutral, non-

[3] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (quoting Walz v. Tax Commission, 397 U.S. 664, 668 (1970))).

[4] Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (explaining that the religion clauses have "zealously protected [religion], sometimes even at the expense of other interests of admittedly high social importance").

[5] *See Locke*, 540 U.S. at 715-16; Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986).

[6] *See* MO. CONST. ART. 1, § 7 (West 2016) (providing that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion").

religious purposes, such as resurfacing the playground of a daycare center to make it safer for the children who play on it every day.[7]

In these types of situations, the First Amendment justifications for prohibiting religious organizations and individuals from participating in these programs are simply inadequate, especially when the states and courts concede that granting the funds to these organizations and individuals would *not* result in Establishment Clause concerns.[8] The constitutional question must become whether the state is in violation of the Equal Protection Clause when the issuing of public assistance benefits to an applicant would *not* offend the First Amendment's Establishment Clause, but the state still refuses to grant this assistance solely due to the applicant's religious status.

When a fundamental liberty such as religious freedom has been compromised by the state, and an individual has effectively been prevented from pursuing an interest rooted in the heart of American tradition, the state's fear of *potential* entanglement issues cannot constitute a valid justification for this type of discrimination.[9] In these instances, the Equal Protection Clause must be invoked,[10] and a strict scrutiny standard must be applied to ensure that the state has demonstrated a compelling interest which justifies the blanket prohibition against religion and narrowly tailored means to achieve and recognize that interest.[11] This author argues that the Supreme Court and lower federal courts would be better equipped to consider

---

[7] Colorado Christian University v. Weaver, 534 F.3d 1245, 1255 (10th Cir. 2008) ("[T]he State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the *wholesale exclusion* of religious institutions and their students from otherwise neutral and generally available government support") (emphasis added).

[8] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779. (8th Cir. 2015), *cert. granted,* 136 S. Ct. 891 (2016) (No. 15–577) (refusing to distribute state funds to a church even though it was conceded that distributing the funds would not violate the Establishment Clause).

[9] *See* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("Not all entanglements, of course, have the effect of advancing or inhibiting religion [because] [i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two") (internal citation omitted).

[10] McDaniel v. Paty, 435 U.S. 618, 643 (1978) (White, J., concurring) (urging the Court to analyze the provision of a state constitution under Equal Protection, and not the First Amendment, to determine whether the blanket prohibition of ministers and priests from running for office was constitutionally impermissible).

[11] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 161 (1994) (Scalia, J., dissenting) (stating that although not at issue in the case, religion would presumably be among the classifications deserving of heightened scrutiny) (citing Larson v. Valente, 456 U.S. 228, 244-46 (1982)).

these discriminatory statutes if the initial constitutional inquiry centered around the Equal Protection Clause of the Fourteenth Amendment and not the religion clauses of the First Amendment.

Section I of this paper will discuss *Trinity Lutheran Church of Columbia v. Pauley*,[12] a case that will be decided by the Supreme Court in 2017 regarding the constitutionality of a provision in the Missouri Constitution prohibiting a religious daycare from receiving a publicly funded recycled scrap-tire grant that would be used to resurface its playground solely due to its status as a religious institution.[13] Section II will provide readers with an understanding of the importance that religious freedom played in the formation of the United States and will also explain the reasoning behind the Court's inclination to turn to the First Amendment in all instances where religious issues have been presented before it. Section III will survey the Court's First Amendment jurisprudence. Specifically, it will argue that due to the Court's inconsistent application of Establishment Clause tests, violations of the Equal Protection Clause tend to become overshadowed and ignored, permitting statutes that otherwise violate other provisions of the Constitution to be upheld. Section IV will survey the Court's Equal Protection jurisprudence, including its criticisms, and explain why Equal Protection analyses would better serve the interests of challengers who have been discriminated against by policies that widely prohibit religious institutions from public assistance programs that provide generally available, religion-neutral benefits. Section V will analyze *Trinity* under the Equal Protection Clause of the Fourteenth Amendment, applying both a strict scrutiny and intermediate scrutiny standard to demonstrate that under either standard of review, the state's "fear of entanglement" does not justify the deprivation of a fundamental liberty interest.

II. TRINITY LUTHERAN CHURCH OF COLUMBIA V. PAULEY[14]

Trinity Lutheran (hereinafter "Trinity") is a church that expanded its Christian-based ministry services to children after

[12] Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 891 (2016) (No. 15–577).

[13] *Id*. at 782.

[14] 788 F.3d 779 (8th Cir. 2015).

merging with Learning Center in 1985.[15] In an effort to make improvements to the surface area of the Learning Center's playground—upgrading the existing gravel surface to a safer rubberized surface—Trinity Church applied for one of several "Playground Scrap Tire Surface Material Grants" offered though the Missouri Department of Natural Resources and opened to the public.[16]

Although Trinity was ranked fifth amongst all of the organizations that applied for the grant,[17] it was denied the funding because the state determined that the distribution of aid to a religious organization would violate Article I, Section 7 of the Missouri Constitution.[18] Article I, Section 7 placed an absolute prohibition on a state's ability to distribute funds from the state treasury to any religious organization[19] and did not make any exceptions, even where the program provided generally available, neutral benefits.[20]

Trinity filed a claim in the United States District Court for the Western District of Missouri, challenging the constitutionality of Missouri's strict prohibition against state aid to religious organizations.[21] In its complaint, Trinity urged the district court to review Section 7 of the Missouri Constitution under a strict scrutiny standard.[22] If the court adopted this standard of review, the state would need to demonstrate that there was a compelling state interest that justified the absolute ban on distributing aid to religious organizations.[23] The state would also need to prove that the means adopted by the state to advance its compelling state interest were narrowly tailored to recognize that interest—meaning that the blanket prohibition against religious organizations from state aid programs did not sweep too broadly.[24] Pauley, being sued directly in her

---

[15] *Id.* at 782.

[16] *Id*.

[17] Brief for Petitioner at 5, *Trinity*, 788 F.3d 779 (8th Cir. 2016) (No. 15-577) ("The DNR criteria for ranking applications are entirely secular and neutral. . . [and] include, among other things, whether the application describes the project in adequate detail, includes quotes from at least three scrap tire vendors, and has a detailed plan for installation.").

[18] *Trinity*, 788 F.3d at 782.

[19] MO. CONST. ART. 1, § 7 (West 2016).

[20] *Trinity*, 788 F.3d at 792 (Gruender, J., concurring).

[21] *Trinity,* 788 F.3d at 782.

[22] *Trinity* Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1146 (W.D. Mo. 2013).

[23] *Id*. at 1155.

[24] *See McDaniel*, 435 U.S. at 645 (White, J., concurring).

capacity as the director of the Department of Natural Resources Solid Waste Management Program, immediately moved for a motion to dismiss for failure to state a claim under Rule 12 (b)(6) of the Federal Rules of Civil Procedure.[25]

In its analysis of Trinity's claims, the district court was guided substantially by the Supreme Court's holding in *Locke v. Davey,*[26] a decision that upheld a state statute prohibiting post-graduate theology students from receiving state scholarship aid even though they met the eligibility requirements for the program.[27] In that case, the Court held that there would be a clear Establishment Clause violation if students used state funds to obtain religious training.[28] Trinity attempted to distinguish its case from *Locke*, citing to the holding in *Colorado Christian University v. Weaver.*[29] In that case, the Tenth Circuit interpreted *Locke* as a limitation on the state's ability to prohibit funding to organizations or individuals based on their religious status only in instances where the funds would be used to train clergy members and prepare them for ministry.[30] However, despite Trinity's efforts, the district court rejected this interpretation of *Locke* and held that it was reasonable for the state to exclude Trinity from the program due to its "legitimate interest in avoiding government entanglement with religion."[31]

The district court also emphasized the applicability of the Free Exercise Clause, explaining that it should be read in terms of what states are *permitted* to do, not what they are *required* to do.[32] Even though the court reasoned that there is some "play between the joints" built into the First Amendment religion clauses, it stated that there is nothing in the U.S. Constitution that compels a state to distribute funds to a religious organization, even when giving the funds would not be in violation of the Establishment Clause.[33]

---

[25] *Trinity*, 976 F. Supp. 2d at 1141.

[26] 540 U.S. 712 (2004) (upholding a statute which prohibited post-graduate theology students from receiving state scholarship aid even though they met the eligibility requirements for the program).

[27] *Id*. at 717 (stating that the student had met the academic and financial requirements to become eligible for the state-funded scholarship).

[28] *Id*. at 720.

[29] 534 F.3d 1245 (10th Cir. 2008) (limiting *Locke* to prohibiting the state from aiding in the training of clergy).

[30] *Id*. at 1254-56.

[31] *Trinity*, 976 F. Supp. 2d at 1152.

[32] *Id.* at 1146.

[33] *Id*. at 1147.

Because the district court did not find a violation of the religion clause under the First Amendment, it determined that it was appropriate to use a rational basis test to evaluate Trinity's Equal Protection claim.[34] Under a rational basis standard of review, the State of Missouri was required to show that the prohibition against religious organizations from receiving public funds was rationally related to its legitimate interest in maintaining a strict separation of church and state.[35] As rational basis is a low standard of review, it was easily satisfied, and all of Trinity's federal claims were rejected.[36] After its federal claims were dismissed, *Trinity* advanced two state law claims,[37] which the district court heard under its supplemental jurisdiction and ultimately rejected as well,[38] leaving Trinity without any legal remedy.

After Trinity's case was dismissed, Trinity made a motion to amend its complaint to present new evidence showing that the state had previously granted aid to other similarly situated religious organizations.[39] Although this newly discovered information arguably would "significantly alter the lawsuit's procedural landscape," and would bolster Trinity's Equal Protection claim, the Court of Appeals for the Eighth Circuit agreed with the district court's decision to deny the motion for being untimely.[39] It then ultimately affirmed the district court's dismissal of the case with substantially similar reasoning on all of Trinity's claims.[40]

The Eighth Circuit's decision is alarming for multiple reasons. First, the court completely rejected Trinity's Equal Protection argument in a single sentence with virtually no

---

[34] *Id*. at 1155.

[35] *Trinity*, 976 F. Supp. 2d at 1155.

[36] *Id*.

[37] *Id*. at 1141 (arguing that if both clauses embedded within Article I, Section 7 were to be read independent of one another, the second clause prohibiting discrimination against any church was clearly violated by excluding Trinity from the program solely because it was a religious organization).

[38] *Id*. (holding that as a rule of statutory construction, both clauses of Article I, Section 7 must be interpreted in harmony).

[39] *Trinity*, 788 F.3d at 788.

[39] *Id*. at 788-89.

[40] *Id*. at 790 (holding that Trinity's motion was not made in a timely fashion and the district court decided correctly).

explanation as to its reasoning.[41] It should have explained why it was applying a rational basis standard of review in its Equal Protection analysis when the Court has traditionally treated classifications based on religious status as suspect, which demands strict scrutiny to be applied.[42] Second, because the court was presented with evidence that other churches had received scrap-tire grants from the state, it should have allowed the amended complaint since this new evidence would have been essential to Trinity's Equal Protection Claim and probably would have resulted in an outcome in Trinity's favor. If the federal courts were more inclined to analyze religious discrimination cases under the Fourteenth Amendment's Equal Protection Clause, as opposed to operating within the narrow confines of the First Amendment's religion clauses, perhaps the court in this case would have viewed Missouri's "wholesale exclusion" of religion through a more critical lens. In doing so, it might have taken a closer look at Missouri's insufficient justifications for ultimately denying children a safe place to play.[43]

Although an argument can be made that Missouri's longstanding tradition of maintaining a "high wall" between church and state justified the Eighth Circuit's exclusive focus on the First Amendment, an even stronger argument suggests that Missouri's "high wall" interest would not survive under a Fourteenth Amendment analysis.[44] A brief survey of Establishment Clause jurisprudence shows that it is common for courts to narrowly analyze religious issues under the First Amendment only, *not* under the Fourteenth Amendment. Although this practice effectively prevents entanglement issues and the state sponsorship and endorsement of religion, the consequence of this narrow analysis and broad exclusion

---

[41] *Id*. at 788-89 ("in the absence of a valid Free Exercise or Establishment Clause claim, the Equal Protection Clause claim was subject to rational basis review and no compelling interest need be shown").

[42] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (stating that strict scrutiny is applied when the law "is drawn upon inherently suspect distinctions such as . . . religion").

[43] *Trinity*, 788 F.3d at 792-93 (Gruender, J., dissenting in part) (arguing that preventing school children playing on a safe playground does not advance Missouri's antiestablishment interest).

[44] *Trinity*, 788 F.3d at 784 (stating that maintaining a high wall between church and state has been a "bedrock principle of state law for nearly 150 years"); *but see* Luetkemeyer v. Kaufmann, 419 U.S 888, 889-90 (1974) (White, J., dissenting) (arguing that the state's interest in maintaining a strict separation of church and state will not be valid in all instances).

of religion from public benefits programs is that "invidious discrimination" against religious institutions is inevitable.[45]

III. THE ORIGINS OF OUR NATION: WHY EQUAL PROTECTION TAKES A BACKSEAT TO THE FIRST AMENDMENT'S RELIGION CLAUSES

In drafting the U.S. Constitution, the Founders recognized that government-sponsored religion in seventeenth-century England was one of the main catalysts for the American Revolution.[46] By converting religious doctrine into the law of the land, and "[using] the sword" to strictly enforce regulations that had discriminatory effects on minority religious groups, the Church of England maintained control over virtually every aspect of colonial life.[47] For example, if an individual wanted to hold public office or take a seat in Parliament, he was required to be ordained by a bishop of the church, take an oath that he affirmatively rejected religious beliefs that were contrary to the ruling power, and also partake in Anglican sacraments.[48] These highly burdensome laws not only prevented men and women from freely exercising and celebrating their religious beliefs, but they also contributed to the widespread violence and political controversy that had plagued the early Colonies under the rule of the Church of England.[49]

Due to these issues, religious autonomy was a primary concern at national political conventions after the American Revolution.[50] While many delegates at these conventions feared that commingling government with religion would cause corruption amongst churches and religious organizations, others feared that religion would undermine effective government leadership.[51] For a

---

[45] Harris v. McRea, 448 U.S. 297, 322 (1980) (stating that classification schemes are invidious when they rest on a basis that is wholly irrelevant to advancing the purpose of the statute and the interest of the government).

[46] BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES PART III: RIGHTS OF THE PERSON 650 (The Macmillan Co. eds.,1968).

[47] *Id.*

[48] Andrew Lynch, *The Constitutional Significance of the Church of England*, *in* LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 168, 177 (Peter Radan & Denise Meyerson eds., 2005).

[49] SCHWARTZ, *supra* note 46.

[50] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES, § 12.1.1 (5th ed. 2015).

[51] *Id.*

new system of government to work, they recognized the need for an appropriate balance of power between all of the interests at stake.[52] First, they wanted to protect an individual's religious freedoms from unjustified government intrusion because such freedoms were deemed essential to maintaining an ordered society.[53] Second, and perhaps more important, they wanted to prevent government entanglement with any particular religion because this is exactly what occurred with the Church of England during the time period leading up to the American Revolution.[54]

Prior to the ratification of the Bill of Rights in 1791, virtually every state had drafted their own constitutions containing clauses that protected individual religious freedoms and prohibited the states from endorsing any religion.[55] In order to convince the states to "buy in" to the idea of federalism and a strong centralized government, the Founders emphasized the importance of protecting individual religious freedoms at the federal level as well.[56] They created the Establishment and Free Exercise Clauses of the First Amendment in order to protect these freedoms and also to assure that there would be a separation of church and state.[57]

This historical backdrop helps to explain the reason why the First Amendment is usually the *only* constitutional provision at the forefront of the analysis when the Supreme Court is presented with a case involving alleged discrimination against an individual's religion. In fact, in a sweeping effort to protect the First Amendment, federal courts will automatically conduct Establishment Clause or Free Exercise Clause analyses whenever they are faced with an issue that is remotely religious in nature, often ignoring other potential constitutional issues such as violations of the Equal Protection Clause.[58]

---

[52] *Id.*

[53] City of Boerne v. Flores, 521 U.S. 507, 552 (1997).

[54] *Id*.

[55] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990) (noting that Connecticut was the only state to not have a religious freedom clause in its constitution).

[56] SCHWARTZ, *supra* note 46, at 650-51.

[57] SCHWARTZ, *supra* note 46, at 652.

[58] *See McDanie*l, 435 U.S. at 643 (White, J., concurring).

IV. THE INADEQUACY OF A FIRST AMENDMENT ANALYSIS IN THE CONTEXT OF PUBLIC BENEFITS PROGRAMS

The purpose of the Establishment Clause is to provide protection against the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[59] However, even though the Supreme Court and lower federal courts have attempted to "carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society," there has been great disagreement as to how to conduct an Establishment Clause analysis in instances where state action appears to be sponsoring or endorsing religion.[60] Moreover, inconsistent application of Establishment Clause analyses essentially render the tests inadequate, especially when an Equal Protection analysis would provide more predictability to challengers of statutes alleging discrimination based on religion.

In *Lemon v. Kurtzman*,[61] the Supreme Court articulated what has become known as the "Lemon test"[62]—a three-prong analysis used to determine whether state action is valid under the Establishment Clause.[63] The first prong of the analysis asks whether the statute has a secular legislative purpose.[64] The second prong looks at whether the statute's "principal or primary effect . . . neither advances nor inhibits religion."[65] The third prong asks whether the statute fosters "an excessive government entanglement with religion."[66]

Justice Scalia has analogized this test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried.…"[67] His main criticism is that the Court exploits the mere existence of this ambiguous test, invoking it whenever the Court wants to strike down

---

[59] Walz v. Tax Commission, 397 U.S. 664, 668, (1970).

[60] McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

[61] 403 U.S. 602 (1971).

[62] Larson v. Valente, 456 U.S. 228, 252 (1982) (referring to the test articulated in *Lemon* as the "Lemon test").

[63] *Lemon*, 403 U.S. at 612-13.

[64] *Id*. at 612.

[65] *Id*.

[66] *Id*. at 613.

[67] Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 398 (1993) (emphasis added).

certain state actions and ignoring it when the Court wishes to uphold a particular practice.[68] It should be noted that although other Establishment Clause tests have been developed, the elements of the Lemon test serve as the foundational basis for the "heightened requirements" of subsequent versions of the test.[69]

Throughout Justice Scalia's tenure as a Supreme Court justice, he recognized the Court has demonstrated a "hostility to religion," criticizing dissenters who have traditionally advocated for a very strict separation of church and state.[70] This animus, however, might not be as prevalent as Scalia made it seem. In one of the earliest Establishment Clause cases, *Everson v. Board of Education*,[71] the Court was asked to determine whether a New Jersey statute allowing private Catholic schools to reimburse parents with state funds for transportation costs violated the Establishment Clause.[72] The Court upheld this statute on the grounds that the state funds served the neutral, secular purpose of providing safe transportation to all children.[73] As such, because the purpose was neutral and secular, the strict separation between church and state was not broken.[74] The majority made it very clear that the purpose of the Establishment Clause is to protect this separation in order to prevent the evils associated with commingling government with religion.[75]

Although the Court's Establishment Clause jurisprudence has evolved and expanded since *Everson*, uncertainty remains as to exactly what type of wall the Framers intended and how the Supreme Court should conduct Establishment Clause analyses.[76] There is an

---

[68] *Id*.

[69] *McCreary County, Kentucky*, 545 U.S. at 900-901 (Scalia, J., dissenting) (disagreeing with the majority's articulation of the "objective observer" test for Establishment Clause analyses).

[70] *McCreary County, Kentucky*, 545 U.S. at 900; *see also* Lynch v. Donnelly, 465 U.S. 668, 695 (1984) (Brennan, J., dissenting) (refusing to join the majority's opinion because he believed that the City of Pawtucket was endorsing religion when it displayed its annual "Season's Greetings" banner that featured a Christian nativity scene); Mueller v. Allen, 463 U.S. 388, 404 (1983) (Marshall, J., dissenting) (refusing to join the majority's opinion because he believed that the State of Minnesota violated the Establishment Clause when it granted tax deductions to families with children attending religious schools for the costs of books).

[71] 330 U.S. 1 (1947).

[72] *Id*. at 8.

[73] *Id*. at 18.

[74] *Id*.

[75] *Id.*

[76] CHEMERINSKY, *supra* note 50.

ongoing debate as to whether the Framers had envisioned a *solid wall* that would act as an absolute barrier to any interactions between church and state or whether the wall would allow for *some* infiltration and commingling.[77] However, Establishment Clause cases leading up to and subsequently following *Zobrest* have demonstrated the Court's willingness to accommodate religion, especially when the outcome of the litigation will have a significant impact on children.[78] In *Zobrest v. Catalina Foothills School District*,[79] a deaf child was denied his request to have a publicly employed sign language interpreter—a state employee whose salary was funded by a combination of both state and federal programs—accompany him to his classes at a private Roman Catholic high school.[80] His request was made pursuant to the Individuals with Disabilities Act ("IDEA"),[81] a federal statute that provided public school districts with funding for special education services and accommodations for disabled children.[82] Even though the deaf child's parents transferred him into a private school,[83] IDEA required that the public school district in which the child was originally enrolled to provide the funding necessary for him to receive the special education services at the new school.[84]

The Supreme Court held that there was no Establishment Clause violation.[85] Specifically, it reasoned that "[d]isabled children, not sectarian schools, are the primary beneficiaries of the [Individuals with Disabilities Act]," which was enacted to ensure that disabled children receive the education for which they are entitled.[86] The role of a sign-language interpreter was not to interject or advance her own religious views in the classroom but rather only to accurately convey

---

[77] CHEMERISNKY, *supra* note 50.

[78] *See* Zobrest v. Catalina Foothills Sch. Dist., 963 F.2d 1190 (9th Cir. 1992) (determining whether a deaf child receiving the assistance from an interpreter who was employed by the state was permissible under the Establishment Clause).

[79] *Id*.

[80] *Id*. at 1192.

[81] 20 U.S.C. § 1411 (2016). At the time this action was commenced, the suit was brought under the Federal Education of the Handicapped Act which was amended and superseded by the Individuals with Disabilities Act.

[82] *Id.*

[83] *Zobrest*, 963 F.2d at 1192.

[84] 20 U.S.C. § 1412(a)(10)(A)(i) (2016).

[85] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 14 (1993).

[86] *Id*. at 12-13.

whatever message is being said by the speaker to the disabled child.[87] The Court clearly recognized the importance of guaranteeing a disabled child's right to an education because it overlooked the incidental commingling of church and state that took place when the public interpreter attended religious classes and services with the deaf child.[88]

In declaring that the Establishment Clause "lays down no absolute bar to the placing of a public employee in a sectarian school,"[89] since "[s]uch a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance,"[90] the Court set the stage for a major transition in the Court's Establishment Clause jurisprudence. Through this powerful statement, the Court expressly rejected several longstanding Establishment Clause presumptions that the Court had historically used as guidance in its First Amendment analyses.[91] First, the Court made it clear that the mere presence of a government employee on private school grounds would no longer automatically constitute state sponsorship of a particular religion.[92] Absent clear evidence that the state was attempting to create a "symbolic link" between government and religion, the Court stated that this type of conduct would generally be constitutional.[93] Second, the Court abandoned the presumption that a public employee working on private school grounds would be pressured by the theology in the surrounding environment to advance her own religious views and indoctrinate scripture and ideas upon the students.[94] Because the Court assumed that a public employee working at a sectarian school would operate within the ethical guidelines of her profession and dutifully carry out all of her assigned responsibilities, the Court stated that, absent evidence to the contrary, the placement of a public

---

[87] *Id*. at 13.

[88] *Id*.

[89] *Id.*

[90] *Zobrest,* 509 U.S. at 13.

[91] Agostini v. Felton, 521 U.S. 203, 223 (1997) (explaining that *Zobrest* made it clear that the Court abandoned the presumption that placing a state employee on the grounds of a religious institution constitutes a symbolic union of church and state prohibited by the Establishment Clause).

[92] *Id*.

[93] *Id*.

[94] *Id*.

employee in a sectarian school would likely be upheld as constitutional.[95]

In his dissenting opinion, Justice Blackmun argued that the Establishment Clause is violated any time "a sectarian school enlists 'the machinery of the State to enforce a religious orthodoxy.'"[96] He was concerned that the interpreter was tasked with *conveying* religious messages to the student and that the interpreter's regular working environment would be "so pervaded by discussions of the divine, [that] the interpreter's every gesture would be infused with religious significance."[97] Although the majority believed that the interpreter would dutifully carry out her responsibilities,[98] Justice Blackmun argued that it was possible that over the course of the student's educational career, the interpreter would build relationships with parochial school officials, become persuaded by theological messages she was conveying to the student, and possibly advance her own theological viewpoints.[99]

However, despite his arguments that the Establishment Clause was violated in this case, Justice Blackmun did concede that "[w]hen government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion."[100] This statement makes it difficult to reconcile Blackmun's overall dissent in this case. Arguably, there is virtually no difference between a program where the government gives direct aid to religiously affiliated schools and a program where the government gives the same exact financial aid to private individuals, enabling them to use the aid towards tuition costs at the very schools the government was not allowed to provide funding for in the first place.

After *Zobrest*, the Court continued to emphasize that a clear distinction must be made between state programs that provide funding directly to religious organizations and programs that distribute funds indirectly to sectarian schools through students to be

---

[95] *Id.*

[96] *Zobrest*, 509 U.S. at 22 (Blackmun, J., dissenting) (quoting Lee v. Weisman, 505 U.S. 577, 592 (1992)).

[98] *Id*. at 19 (Blackmun, J., dissenting).

[98] *Id*. at 13.

[99] *Id*. at 22-23 (Blackmun, J., dissenting).

[100] *Id*.

used for tuition, books, and transportation expenses.[101] For example, the Court in *Zelman v. Simmons-Harris*[102] held that a voucher program that provided financial assistance to low-income families to help fund their children's education at private parochial schools did not violate the Establishment Clause.[103] Here, the State of Ohio initiated the program to give parents the opportunity to send their children to private schools that significantly outperformed the inner-city public schools.[104] The issue facing the Court was that over eighty percent of the vouchers were used for tuition at religiously affiliated schools, prompting opponents of the program to argue that the vouchers violated the Establishment Clause.[105]

In upholding the voucher program as constitutional, the Court reasoned that even though many families were using the state aid to fund their children's education at parochial schools, the program itself was entirely neutral and neither favored nor disfavored any type of religion.[106] In fact, the only criteria used to determine which families were eligible for the funding was their household income.[107] The majority reached its desired outcome by reasoning that the state was acting with the important secular purpose of providing the best possible education for the inner-city children.[108]

These conclusions fall directly in line with Justice Scalia's view that the Court will ignore the traditional Establishment Clause tests—for better or worse—whenever it wishes to reach a desirable result.[109] In all, this backdrop of Establishment Clause cases makes it difficult to reconcile instances, such as *Trinity*, where the federal courts have refused to grant constitutional relief to claimants that were denied government funding solely because of their religious status, *even though it was conceded that providing the funding to the*

---

[101] *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (allowing the state to give financial assistance to low-income families to help them pay for tuition at higher performing parochial schools).

[102] *Id*.

[103] *Id*. at 643-44.

[104] *Id*. at 644.

[105] *Id*. at 646-47.

[106] *Zelman*, 536 U.S. at 653.

[107] *Id*. at 640 ("The only preference in the program is for low-income families, who receive greater assistance and have priority for admission").

[108] *Id*. at 640 ("[T]he program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system").

[109] *Lamb's Chapel*, 508 U.S. at 398.

church would not be an Establishment Clause violation.[110] In these instances, it appears that the courts are attempting to circumvent Fourteenth Amendment Equal Protection analyses in an effort to maintain the strict separation of church and state advocated for by the Founders and many of the Supreme Court justices. As discussed below, even when there are First Amendment rights at stake in cases centered around religious issues, there is a strong argument to be made that a Fourteenth Amendment Equal Protection analysis would be much more effective in providing justice to all parties.

V. THE ARGUMENT FOR EQUAL PROTECTION: WHY THE FOURTEENTH AMENDMENT MUST BE INVOKED WHEN THE STATE PLACES BLANKET PROHIBITIONS ON RELIGION

A. Setting the Stage for a Shift Towards Equal Protection

The proposition of shifting to an Equal Protection analysis in instances where the state places blanket prohibitions on religion might appear to disturb the longstanding tradition of the Court to focus narrowly on the First Amendment religion clauses whenever Establishment Clause or Free Exercise Clause issues arise. However, a shift towards making the Equal Protection Clause the primary means to evaluate these types of cases is a concept that has received some support by Justice White. In fact, in his concurring opinion in *McDaniel v. Paty*,[111] White saw *only* an Equal Protection issue when presented with a provision of the Tennessee Constitution placing a blanket prohibition on ministers and priests of any denomination from serving as delegates in the Tennessee's constitutional convention.[112] Although the plurality of the Court held that this provision violated the protections afforded by the First Amendment

[110] *Trinity*, 788 F.3d at 784 ("[I]t now seems rather clear that Missouri could include the Learning Center's Playground in a non-discriminatory Scrap Tire grant program *without* violating the Establishment Clause") (emphasis added); *See also* Locke v. Davey. 540 U.S. 712 (2004) (holding that a state is not required to fund a scholarship to an individual that would have used the funds to pursue a degree in theology, even though funding the scholarship would not have been in violation of the Establishment Clause").

[111] 435 U.S. 618 (1978).

[112] *Id*. at 621.

religion clauses,[113] Justice White did not see such an encroachment on a minister's right to freely exercise his religious beliefs.[114]

Instead of engaging in a First Amendment analysis, White made the argument that the Court should have evaluated this case under the Fourteenth Amendment's Equal Protection Clause.[115] He argued that a constitutional provision which disqualifies *all* religious clergy members from running for public office sets forth a classification scheme which is both underinclusive and overinclusive at the same time, failing to advance the purpose of the provision and the legitimate interests of the state.[116] Even though Tennessee attempted to justify its absolute prohibition on clergy members from taking a seat in public office based on its interest in maintaining a strict separation between church and state, it recognized that not all clergy members running for office would allow their religious commitments and beliefs interfere with the duties owed to their constituents.[117] Additionally, this wholesale exclusion of ministers and priests from holding legislative positions swept too broadly, depriving qualified clergy members of their interest in gaining ballot access—an important individual right that requires a "substantial justification" by the state in depriving a class of persons from the opportunity to run for public office.[118] Although Justice White urged the Court to evaluate this type of absolute prohibition under the Fourteenth Amendment, and not the Free Exercise or Establishment Clauses under the First Amendment as discussed by the majority, he did not articulate a fully comprehensive framework for analysis that would provide consistency in deciding future cases.[119]

To understand *how* the Court should engage in Equal Protection analyses in these situations, it is first necessary to explain

---

[113] *Id*. at 627-29 (holding that this provision forced clergy members who wanted to run for office to surrender their religious beliefs in violation of the Free Exercise Clause of the First Amendment).

[114] *Id*. at 643-44 (White, J., concurring) (arguing that this constitutional provision in no way interfered with the minister's free exercise of his religion).

[115] *Id*. at 643.

[116] *McDaniel*, 435 U.S. at 645. (explaining that the state does have an interest in ensuring that elected members of the clergy did not allow their religious obligations to interfere with the duties owed to the constituents who elected them).

[117] *Id*.

[118] *Id*. at 643-45.

[119] *Id*. at 644-45 (explaining that the Court's analysis should have focused on the Fourteenth Amendment's Equal Protection Clause, but did not identify the level of scrutiny to apply to discrimination based on religion).

how its Equal Protection jurisprudence has developed over time. This discussion is critical to determine which standard of review the Court should adopt if it were to analyze *Trinity* as well as future religious discrimination cases under an Equal Protection analysis instead of the First Amendment religion clauses. In discussing how to treat Trinity's Equal Protection claim, the Court must distinguish this case from the existing caselaw which has been limited to situations where the state's discrimination has only been amongst similarly situated *religious organizations*. This is a critical distinction because there are virtually no cases where the Supreme Court has invoked an Equal Protection analysis to evaluate state action that has discriminated against similarly situated religious *and* non-religious organizations in determining qualification criteria for generally available, public benefits programs administered by state agencies. It is therefore necessary to survey the evolution of the Equal Protection Clause to determine where classifications based entirely on religion fit within the several tiers of scrutiny already established by the Court.

B. The Origins, Evolution, and Criticisms of the Equal Protection Framework

The critical language of the Fourteenth Amendment is straightforward, as it commands that "[no state shall] . . . deny to any person within its jurisdiction the equal protection of the law."[120] Because the language is seemingly all-encompassing, a common misconception of the Equal Protection Clause is that an individual's constitutional rights are unequivocally violated whenever he or she is subjected to unequal treatment.[121] However, this is simply not true, as claimants who wish to successfully invoke Equal Protection carry the burden of establishing the existence of discriminatory state action and the state's *intent* to discriminate in enacting or carrying out its

[120] U.S. CONST. amend. XIV, § 1.

[121] Wright v. Rockefeller, 376 U.S. 52, 58 (1964) (holding that even though there were inferences of discrimination, "appellants have not shown that the challenged part of the New York Act was the product of a state contrivance to segregate on the basis of race or place of origin"); J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 56 (2002) (arguing that journalists following the September 11, 2001 terrorist attacks were under a "misconception" that *any* racial profiling for *any* reason would constitute a *per se* violation of Equal Protection).

legislation.[122] In other words, it is not enough to show only disparate impact—purposeful state discrimination must be proven as well.[123]

In the context of state action, it is important to distinguish between acceptable discrimination and *unconstitutional* discrimination, as virtually every state law discriminates against individuals to some extent.[124] Discrimination simply means that a law treats different groups of people in a different way, often by merely placing individuals into different classifications for legitimate and constitutional reasons.[125] In most instances, these distinctions are necessary for the state to fully protect its citizens.[126] For example, when a state enacts legislation that sets forth the minimum age to negotiate and enter into a binding contract, purchase alcoholic beverages, or collect retirement benefits, it may constitutionally treat minors differently than individuals who have reached the age of majority.[127] These types of discriminatory legislation are generally upheld so long as the state can assert that at least some sort of legitimate state interest is served when it treats these different age groups differently and that the regulation is rationally related to that state interest.[128] For example, the enforcement of a minimum drinking age is a legitimate state interest because it maintains safer roadways and helps teenagers stay healthy and avoid alcohol-related medical problems that would eventually put a drain on state resources.[129] Similarly, the states have a legitimate interest in maintaining control over who is eligible to receive retirement benefits to ensure that the program is well-funded and self-sustaining.[130] Enacting legislation which sets forth a minimum age for drinking or

---

[122] Duren v. Missouri, 439 U.S. 357, 371 (1979) (Rehnquist, J., dissenting) (stating that under an Equal Protection analysis, "prima facie challenges are rebuttable by proof of absence of intent to discriminate").

[123] *See* Vill. of Arlington Heights v. Metro. Hous., 429 U.S. 252, 264-65 (1977).

[124] John F. Niblock, *Anti-Gay Initiatives: A call for Heightened Judicial Scrutiny*, 41 UCLA. L. REV. 153, 164 (1993).

[125] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 109 (1976).

[126] Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 103 (2014).

[127] CHEMERINSKY, supra note 50, at § 9.1.2.

[128] *See* Williamson v. Lee Optical, 346 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it").

[129] *Williamson,* 346 U.S. at 488 (giving substantial deference to the state legislature under rational relation).

[130] *Id*.

retirement benefits is rationally related to the advancement of these legitimate state interests.[131] Equal Protection requires similarly situated classes of individuals to be treated exactly the same—meaning that *no* class of minors is exempt from the state's minimum drinking age and *all* citizens must wait until they reach the state's retirement age before they are capable of receiving benefits.[132] So long as that criteria is satisfied, the discriminatory treatment will not violate the Equal Protection Clause.[133]

C. Slaughter-House Cases and the Original Framework for Equal Protection Analyses

Only four years after the Fourteenth Amendment was ratified in 1868,[134] the Supreme Court decided a series of cases collectively referred to as the "Slaughter-House Cases."[135] In these cases, the city of New Orleans enacted legislation incorporating and monopolizing the city's slaughterhouse and butcher shop industry.[136] This legislation resulted in a single corporation controlling virtually every aspect of the trade, forcing butchers and private operators of slaughter-houses to comply with the corporation's high fees and be subject to harsh penalties if they violated the new legislation.[137] The Butchers' Benevolent Association of New Orleans argued that the legislation was in violation of the Fourteenth Amendment because it granted one group of individuals the exclusive rights to operate slaughter-houses but prohibited individuals already in the industry from continuing their business.[138] The Court held that there was no violation of the Equal Protection Clause because it could not fathom its application outside the realm of racial discrimination against newly freed African American slaves post-Civil War.[139] Specifically, the Court stated that the Equal Protection Clause was "so clearly a

---

131 *Id*.
132 *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011).
133 *See generally* CHEMERINSKY, *supra* note 50, at § 9.1.2.
134 U.S. CONST. amend. XIV, § 1.
135 83 U.S. 36 (1872).
136 *Id*. at 39.
137 *Id*. at 40.
138 *Id*. at 50.
139 *Id*. at 81.

provision for [the African American race] . . . that a strong case would be necessary for its application to any other."[140]

However, since the Slaughter-House Cases, the framework of the Fourteenth Amendment has evolved substantially. As discussed in greater detail below, not only does the Equal Protection Clause protect classes of individuals based on race, but it also now provides protection against discrimination based on age, sex, gender, national origin, and even non-suspect classes as well.[141] Once the Supreme Court classifies and categorizes the individuals subjected to state action, it then decides the applicable level of scrutiny to apply to the enacted statute to determine the constitutionality of the law.

D. Defining Suspect Classes and Applying Strict Scrutiny

It is well established that if a state enacts legislation that is discriminatory on its face against a suspect class, it will most likely be struck down by the Court as unconstitutional.[142] A suspect class is one that has been "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[143] It also includes individuals who have historically been subjected to stereotypes that wrongfully undermine their abilities.[144] For example, when statutes make classifications based on race, national origin, and alienage, these types of classifications are "inherently suspect" and are subjected to the most rigorous scrutiny standard of review.[145]

Under strict scrutiny, the Court will first ask whether the state enacted legislation is "necessary to achieve . . . [the] compelling interest."[146] It will then ask whether the means are "narrowly tailored" to achieve the government's "asserted purpose," as applied

---

[140] *Slaughter House Cases*, 83 U.S. at 81.

[141] CHEMERINSKY, *supra* note 50, at § 9.1.3.

[142] Hunter v. Erickson, 393 U.S. 385, 391-93 (1969) (holding that any legislation that makes explicit racial classification are subject to the most rigid scrutiny).

[143] San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[144] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

[145] Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

[146] Stephen A. Siegel, *The Origin of Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL. HIST. 355, 360 (2006).

to individuals that are similarly situated.[147] If the Court applies a strict scrutiny standard to a state law, the burden is on the state to prove that its law meets the standard.[148] The likelihood that a state will be successful in overcoming its burden is low, as empirical studies show that a mere thirty percent of state statutes survive under this standard of review.[149] Although the above description is a current articulation of the strict scrutiny analysis, it took well over a century for the Supreme Court to develop this standard of review.

As the Slaughter-House Cases made clear, the original interpretation of the Fourteenth Amendment's Equal Protection language was strictly a prohibition against the hostile treatment of former African American slaves.[150] However, the Supreme Court's interpretation and understanding of the Equal Protection Clause did not lead to the actual equal treatment of African Americans. In fact, the Supreme Court's holding in *Plessy v. Ferguson*[151] established that "separate but equal" was the law of the land, mandating that similarly situated whites and blacks must travel on separate train cars, eat in different sections of restaurants, and even drink from separate water fountains.[152] "Separate but equal" policies were not viewed as discrimination because the Supreme Court had an exceptionally narrow view of the Fourteenth Amendment.[153] It would take over forty years before the Court began to recognize the need for a heightened level of judicial inquiry.[154]

Interestingly enough, in a 1938 case involving a controversy over an interstate ban against shipping condensed skimmed milk,[155] Justice Harlan Stone would pen what would become known as one of the most famous footnotes in the Supreme Court's illustrious history.[156] In *United States v. Carolene Products*,[157] the majority held

---

147 *Id.*

148 Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2419 (2013).

149 Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Court*, 59 VAND. L. REV. 793, 795 (2006).

150 *Slaughter-House Cases*, 83 U.S. at 81.

151 163 U.S. 537 (1896).

152 U.S. v. City of Montgomery, 201 F. Supp. 590, 592 (M.D. Ala. 1962)

153 Vincent Martin Bonventre, *Judicial Activism, Judge's Speech, and Merit Selection: Conventional Wisdom and Nonsense*, 68 ALB. L. REV. 557, 570 (2005).

154 *See* United States v. Carolene Products, 304 U.S. 144 (1938).

155 *Id*. at 146.

156 Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

157 304 U.S. 144 (1938).

that it would operate under the presumption that lawmakers have a rational basis whenever they enact economic regulations.[158] To overcome this presumption, the plaintiff would have to prove the existence of prejudice either through an attack on the statute's facial validity or through its operation.[159] Otherwise, the Court would conduct no further inquiry.[160] In Footnote Four, the Court declared that the role of the judiciary is to determine "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[161] The footnote made it clear that in order to maintain the integrity of the American political process, and to promote a true democratic system, there must be significant protection afforded to members of "suspect-classes" who have no voice to protect their own rights.[162] Because *Carolene Products* involved mere economic regulations and not "discrete and insular minorities," a more searching judicial inquiry was unnecessary.[163] Regardless of the actual holding in this case, Footnote Four demonstrated the Court's increasing concern to protect underserved individuals in the American political system.[164]

Several years later and in the midst of World War II, the Supreme Court struggled in deciding *Korematsu v. United States*,[165] a case that asked whether relocating Japanese Americans into detention centers during wartime violated the protections granted to these citizens by the United States Constitution.[166] Fearful that these citizens were disloyal and would commit acts of espionage to help aid Japan's war effort against American forces, the United States military performed a mass evacuation of all Japanese Americans

---

158 *Id*. at 152.

159 *Id*. at 153-54.

160 *Id*. at 153.

161 *Id*. at 152 n.4.

162 MELVIN I. UROFSKY, BASIC READINGS IN U.S. DEMOCRACY IV 34 (Melvin I. Urofsky ed., 1994).

163 *Carolene Products*, 304 U.S. at 152 n.4.

164 Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1291 (1986).

165 323 U.S. 214 (1944).

166 *Id*. at 217-18.

without a screening process.[167] Although the Court held that this type of disparaging treatment was deemed necessary and acceptable during a time of war and national emergency, this decision ultimately articulated a rendition of what would become known as the current strict scrutiny standard.[168]

Mr. Justice Black, writing for the majority, began his opinion by stating that "[a]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.[169] That is not to say that all such restrictions are unconstitutional.[170] It is to say that courts must subject them to the most rigid scrutiny."[171] Although the Supreme Court did not define this standard of review as "strict scrutiny," it clearly identified that there was a need to ensure that enacted legislation did not single out specific racial groups or interfere with their civil liberties.[172]

Once the Court fully recognized that there was a substantial need to protect discrete and insular minorities who were not afforded recourse in the political system, the principle underlying the need for heightened scrutiny was used to abolish "separate but equal" mandates for public facilities and segregation in public school districts[173] and was used in cases involving national origin,[174] and affirmative action as well.[175] However, following the articulation of this heightened standard of review, it is important to note that not every class of individuals will be categorized as suspect and not every legislative act that has a resulting discriminatory effect on individuals will be deemed unconstitutional by the Supreme Court. Therefore, the Court must carefully determine the appropriate standard of review to be used on a case-by-case basis, applying

---

[167] *Id*. at 218-21.

[168] *Id*. at 216.

[169] *Id.*

[170] *Korematsu*, 233 U.S. at 216.

[171] *Id*.

[172] *Id*. at 219-20.

[173] Brown v. Board of Educ. of Topeka, Kansas, 349 U.S. 294, 298 (1955).

[174] Johnson v. California, 543 U.S. 499, 508-09 (2005) (applying a strict-scrutiny standard of review to analyze state prison policy which required prisoners of the same national origin and race to be segregated from one another in an effort to prevent gang violence in the prison).

[175] Fisher v. University of Texas at Austin, 136 S. Ct. 2198, 2209-2210 (2016) (holding that the university had a continuing obligation to satisfy a strict-scrutiny constitutional inquiry when evaluating its admissions standards that included an affirmative action policy).

existing case law and precedent based on the specific issues that are presented before the them.[176]

E. Rational Basis Standard of Review

Even when governmental interests do not implicate a suspect class, the Supreme Court will still conduct an Equal Protection analysis using a lower standard of review to determine whether the state-enacted statute unjustly distinguishes between classifications of persons or businesses.[177]

It is common for states to enact legislation that places individuals into different classifications based on their age, wealth, sexual orientation, or disability status.[178] It is also common for states to implement economic regulations in an effort to control and standardize the different types of businesses permitted to operate in their jurisdictions.[179] The government justifies this unequal treatment of individuals and businesses by arguing that it is necessary for carrying out legitimate state interests, such as determining an individual's eligibility for certain government programs, creating more efficient government hiring procedures, and maintaining well-regulated business districts.[180] Because these types of classifications

---

[176] Michael J. Bartlett, *Idaho Schools for Equal Educational Opportunity v. Evans: Education, a Fundamental Element of Liberty*, 31 IDAHO L. REV. 595, 613 (1995) ("The choice regarding which standard to apply is the most important aspect of any equal protection challenge because of the great disparity in protection available through each [standard of review]").

[177] See generally *Williamson*, 348 U.S. at 487-88.

[178] Gregory v. Ashcroft, 501 U.S. 452, 470-71 (1991) (holding that a mandatory retirement age for state judges was valid under rational basis because age is not a classification deserving of heightened protection); *City of Cleburne, Texas,* 473 U.S. 432, 446 (1985) (refusing to apply a heightened standard of review of a classification of mentally incompetent individuals); Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (holding that a standard court filing fee did not warrant a heightened level of review even though it was argued that it gave wealthy individuals easier access to the courts than poor individuals).

[179] City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding an ordinance which denied certain food vendors the ability to obtain permits that would allow them to operate in an historic tourist attraction).

[180] *Ashcroft*, 501 U.S. at 471 (justifying mandatory retirement because it "increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement"); *City of Cleburne, Texas*, 473 U.S. at 449-50 (holding that the classification of the mentally ill did not require heightened scrutiny but striking down a zoning regulation for failing to satisfy rational basis); *Ortwein*, 410 U.S. at 660 (justifying the lower standard of review because no suspect class was present and the state court system implementation of standardized filing fees was rationally related to its purpose of covering operating expenses).

are not considered to be suspect by the Court, they are challenged under a much less stringent standard of review known as rational basis which gives the state legislature a tremendous amount of deference.[181]

When a rational basis standard of review is applied, the burden is placed on the plaintiff challenging the legislation to prove that the law does not serve any conceivably legitimate purpose and that the law bears no rational relation to achieving that interest.[182] However, the plaintiff faces an uphill battle to satisfy this burden because a tremendous amount of deference is given to the state in these types of cases.[183] In fact, when this standard of review is applied, the state will virtually always win unless the law demonstrates a "clear showing of arbitrariness and irrationality."[184]

For example, in 1955, the Supreme Court in *Williamson v. Lee Optical of Oklahoma*[185] upheld a state statute authorizing licensed optometrists and ophthalmologists to fit prescription lenses.[186] The Court held that the state's interest in restricting the care of eyes to licensed professionals advanced the public's health and did not rise to the level of "invidious discrimination."[187] Common with cases utilizing the rational basis standard of review, the Supreme Court gave deference to the legislature and held that it was not the Court's role to interpret the logic behind the bill, just the constitutionality.[188]

In 1976, the Supreme Court in *City of New Orleans v. Dukes*[189] upheld a New Orleans ordinance prohibiting hot dog cart vendors from obtaining permits to continue their business in the

---

[181] *Id*.

[182] Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (stating that under rational basis, a plaintiff must be able to demonstrate that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment").

[183] Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (explaining that under a traditional rational basis standard of review, the Court give a tremendous amount of deference to the legislature in presuming that the enactment is constitutionally valid).

[184] Hodel v. Indiana, 452 U.S. 314, 331-32 (1981) (stating that under rational basis review, state laws are given a "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality").

[185] 348 U.S. 483 (1955).

[186] *Id*. at 487.

[187] *Id*. at 489.

[188] *Id*. at 487.

[189] 427 U.S. 297 (1976).

historic Vieux Carre French Quarter if they had been in operation for less than eight years and "grandfather[ing]" vendors of the same food products who had been conducting business for over eight years.[190] In determining whether this statute was in violation of Equal Protection, the Supreme Court held that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[191] Here, the legitimate state interest was preserving the appearance and historic culture of this highly trafficked tourist attraction.[192] The law rationally related to the state's interest in preserving this historic culture because experienced, longstanding vendors helped to maintain the consistency, order, and culture that made the city a famous tourist attraction in the first place.[193]

Although rational basis has been consistently applied by the Court, its major criticism is that the test doesn't have enough "bite," giving far too much deference to the legislature and allowing the justices to avoid any real inquiry into the actual purpose of the legislation.[194] Furthermore, in instances where the statute in question does not encroach upon discriminating against a suspect class, rational basis does not always provide an appropriate level of scrutiny to ensure that individuals are receiving the protections afforded to them by the Equal Protection Clause of the Fourteenth Amendment.[195] This need for a more exacting level of scrutiny led to the articulation of the intermediate standard of review.

---

[190] *Id*. at 298-99.

[191] *Id*. at 303.

[192] *Id*. at 300.

[193] *Id*. at 304 (explaining that the city had a legitimate interest in preventing "peddlers and hawkers" from interfering with the charm that this tourist attraction has historically maintained).

[194] United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 176 (1980) (explaining that under rational basis, "the plain language of the [statute] marks the beginning and end of inquiry" in its purpose).

[195] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996) (explaining that the modern Fourteenth Amendment framework has provided stability and predictability in analyzing Equal Protection claims).

F. Intermediate Scrutiny Standard of Review

For rational basis and strict scrutiny standards of review, the Supreme Court, as well as commentators and legal scholars, are generally satisfied with the existing framework of analyses.[196] However, there are conflicting views as to how to conduct a scrutiny analysis for quasi-suspect classes, such as sex, gender, and illegitimate children.[197]

The Supreme Court in *Reed v. Reed*[198] invalidated an intestacy statute on the basis of sex discrimination because it gave preference to males over females when there was a tie as to who would become the administrator of a decedent's estate.[199] The Court adhered to the rational basis test and refused to adopt a heightened level of scrutiny for sex, even though its analysis indicated that it regarded sex as deserving of more protection than a rational basis standard would afford.[200] By invoking language that described the legislation as "arbitrary" and lacking a "fair and substantial relation" to the interests advanced by the legislation, it was clear that the Court hinted at adopting a stricter standard of review for sex classifications.[201]

Surly enough, just two years later in *Frontiero v. Richardson,*[202] the Supreme Court a plurality of justices drafted an opinion which held that classifications deserved a heightened level of scrutiny because sex is an "immutable characteristic determined solely by birth" and discrimination based on this characteristic has no justification in society.[203] In this case, the plurality appeared to advocate for a level of scrutiny consistent with strict scrutiny, but it did not actually articulate a precise test yet.[204]

After years of debate and lack of consensus among the Supreme Court justices as to how to treat sex discrimination, the

---

196 *Id.*

197 *Cleburne*, 473 U.S. at 469-70 (Marshal, J., dissenting in part) (criticizing the Court for not applying a heightened standard of review for certain classifications).

198 404 U.S. 71 (1971).

199 *Id*. at 73.

200 *Id*. at 76.

201 *Id.* at 76-77.

202 411 U.S. 677 (1973).

203 *Id*. at 686-88.

204 *Id*. (addressing the issues which arise in classifying individuals based on sex, but not explaining how to treat individuals who have changed their natural born sex characteristics though advancements in medical technology).

Supreme Court in *Craig v. Boren*[205] articulated what is now known as the "intermediate scrutiny test."[206] This test requires that any law discriminating on the basis of sex "must serve important governmental objectives and must be substantially related to achievement of those objectives."[207] Although the Court rejected "archaic and overbroad generalizations" of gender roles in the home and at the work place, it refused to use strict scrutiny for sex discrimination cases because it was hesitant to classify sex as a suspect class on the same level as race.[208] It recognized that there are factual scenarios where it might be appropriate to treat males and females differently whereas there are *no* scenarios where it is appropriate to treat blacks and whites differently.[209] Although the Court did not provide specific examples of when sex classifications would be appropriate, it expressly rejected invidious sex discrimination based on outdated stereotypes and distorted statistics.[210]

In *Craig*, the majority struck down an Oklahoma statute allowing females to purchase and consume alcoholic beverages at the age of eighteen but not males.[211] The Court held that even with the evidentiary and statistical findings that demonstrated a correlation between sex and traffic safety, it was not satisfied that "sex represent[ed] a legitimate, accurate proxy for the regulation of drinking and driving."[212] Based on the evidence provided by the state legislature, it was clear that the important government objective was keeping the roadways safe and reducing injury and death caused by drunk driving.[213] However, the Court found that the application of different minimum drinking ages to men and woman was not substantially related to achieving that objective because this statute only advanced antiquated stereotypes of traditional gender roles.[214]

---

[205] 429 U.S. 190 (1976).
[206] *Id*. at 197.
[207] *Id.*
[208] *Id*. at 198-99.
[209] *Id*. at 199.
[210] *Craig,* 429 U.S. at 224 (Rhenquist, J., dissenting).
[211] *Id.* at 204.
[212] *Id*.
[213] *Id*. at 200-201.
[214] *Id*. at 208-209.

G. Justices Have Criticized the Application of Equal Protection Tests.

Justice Rehnquist's dissenting opinion in *Craig v. Boren* is just one example of an onslaught of criticism towards the Court's Equal Protection jurisprudence.[215] He argued that that the majority created intermediate scrutiny entirely "out of thin air," as there was absolutely no language in the Fourteenth Amendment to support the creation of such a standard of review.[216] Since there were already two Equal Protection tests—rational basis and strict scrutiny—that were historically misused and misapplied, he argued that the creation of a middle ground test would do nothing but burden the Court's already difficult framework for Equal Protection analyses.[217]

Justice Marshall's scathingly criticized Equal Protection jurisprudence in his dissenting opinion in *City of Cleburne, Texas v. Cleburne Living Center*.[218] He chided the Court for placing too much emphasis on determining which standard of review to apply to a particular case rather than making a "careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one."[219] In this case, he criticized the majority for not applying a heightened standard of review for a statute that discriminated against the mentally handicapped.[220] He called the majority out for "downplay[ing] the lengthy 'history of purposeful unequal treatment'" of the mentally ill[221] and argued that the Court had a duty to ensure that the mentally ill were able to overcome the barriers imposed by society that are "inconsistent with evolving principles of equality embedded in the Fourteenth Amendment."[222]

Justice Stevens also weighed in on the Equal Protection jurisprudence discussion on several occasions.[223] Specifically, he has

---

[215] *Craig*, 429 U.S. at 217 (Rehnquist, J., dissenting).
[216] *Id*. at 220.
[217] *Id*. at 220-21.
[218] 473 U.S. 432 (1985).
[219] *Id*. at 478.
[220] *Id*. at 470-71.
[221] *Id*. at 465.
[222] *Id.* at 467.
[223] *See Cleburne*, 473 U.S. at 451-55 (Stevens, J., concurring); *Craig*, 429 U.S. at 211-14 (Stevens, J., concurring).

argued that the case law does not provide a consistent Equal Protection standard but instead sets forth a "continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."[224] Furthermore, he has argued that the Fourteenth Amendment does not give freedom to the Court to pick and choose which standard of review to apply in a particular case, as this would constitute an unprecedented "double standard." [225] As Justice Stevens emphasized, "[t]here is only one Equal Protection Clause.[226]

Perhaps the most aggressive attack on the Court's Equal Protection jurisprudence was enshrined in Justice Thomas's recent dissent in *Whole Woman's Health v. Hellerstedt*,[227] in which he expressly accused the majority of engaging in intellectual dishonesty in its analysis.[228] Thomas referred to each standard of review articulated by the Court—whether it be rational basis, intermediate scrutiny, or strict scrutiny—as "made up" and "meaningless formalism[s]", criticizing the Court for purporting to analyze a case under a particular standard, but "tinker[ing] with the level of scrutiny to achieve its desired result."[229] He argued that this type of conduct is a mere pretense which masks the Court's true underlying policy objectives.[230]

H. Summary of Equal Protection and Determining an Appropriate Standard of Review for Religion-Based Classifications in Public Benefits Programs

These jarring dissents discussed above raise a number of concerns surrounding the current state of the Court's Equal Protection jurisprudence—most importantly, its overall adequacy for determining whether the challenged discrimination is impermissible under the Constitution. However, despite some apparent inconsistencies of its application and the criticisms expressed by several dissenting justices, the current Fourteenth Amendment

---

224 *Cleburne*, 473 U.S. at 451.
225 *Craig*, 429 U.S. at 211-12.
226 *Id*. at 211.
227 136 S. Ct. 2292 (2016).
228 *Id*. at 2327 (Thomas, J., dissenting).
229 *Id*. at 2326-27.
230 *Id*. at 2328.

framework has provided a degree of stability and predictability in determining how the Court will decide a particular case.[231] Absent from this discussion, however, is guidance as to how the Court will treat classifications that are based purely on religious belief or status. Since religion is an internal belief that in no way affects the outward capabilities of two similarly situated individuals of different faiths, it is arguable that at least *some form* of heightened scrutiny should be applied by the Court when evaluating state action that discriminates solely on the basis of religion. Invoking a heightened level of scrutiny is especially necessary when evaluating state action that sets up a qualification scheme for generally available public benefits programs, and when it is conceded by the state that the classification scheme is not necessary for the purposes of satisfying the First Amendment Religion Clauses. In these situations, the state's attempt to justify discriminating against religion on the grounds that is attempting to avoid impermissible entanglement issues is meritless.

VI. ANALYZING TRINITY UNDER AN EQUAL PROTECTION FRAMEWORK

A. Overview

As discussed in the preceding sections, Zelman, *Zobrest* and *Everson* have made it clear that the Court's decisions involving religious issues have evolved over time to become more accepting of the reality that not all interactions between church and state are impermissible, especially when the sole beneficiaries of the challenged action are innocent children seeking to enrich their educational opportunities at parochial schools.[232] In fact, the Court has routinely overlooked potential entanglement issues involving state action that provide benefits to disabled children and low income children attending these religiously affiliated schools.[233] But if the Court determines that states are now constitutionally permitted to exclude religious institutions from participating in a benefits program, such as a scrap tire recycling program, solely because of their religious status, this would appear to signal a drastic shift in the Court's religion cases by advocating for an even stricter separation of

[231] Sunstein, *supra* note 195.
[232] *See generally Zelman*, 536 U.S. at 639; *Zobrest*, 509 U.S. at 1; *Everson*, 330 U.S. at 1.
[233] *Id*.

church and state. If this is the case, there is no type of public benefits program where the state would not be able to discriminate against religion—even if the challenged program would help a deaf child attending a parochial school gain access to a state-employed sign language interpreter.[234] These overtones of religious hostility are the catalyst for the state's potentially invidious discrimination, which is why the Court must address this action under the Equal Protection Clause of the Fourteenth Amendment.[235]

Even though the State of Missouri and the lower courts conceded that distributing the funds from the scrap tire program to Trinity would not violate the Establishment Clause, and withholding the funds would not violate the Free Exercise Clause,[236] this does not mean that violations of the Fourteenth Amendment simply fall by the wayside.[237]

Where First Amendment issues invoke the Court's paramount concern of preventing an impermissible commingling of church and state, Equal Protection triggers the Court's judicial instinct to preserve fundamental liberty interests of similarly situated citizens.[239] Although different classifications require varying standards of judicial scrutiny, when it comes to classes other than age, wealth, sexual orientation, disability, or economic regulations, there is at least *some* heightened burden placed on the state to justify its disparaging treatment of these particular classes, including religion-based classifications.[238] It is unclear whether the Court would adopt an intermediate scrutiny, strict scrutiny, or another hybrid standard that combines elements from both of these tests in evaluating Trinity's Equal Protection claim, but as explained below, it is certain that

---

[234] *See* Zobrest, 509 U.S. at 13-14.

[235] *See Church of the Lukumi Babaku Aya*, 508 U.S. at 524-26 (discussing the targeted action the legislature took at the Santeria church to prohibit members from participating in religious ceremonies which the surrounding community found offensive); *see also McDaniel,* 435 U.S. at 643 (White, J., concurring) (urging the Court to evaluate a provision which placed a blanket prohibition on religion to be reviewed under the Equal Protection Clause, and not the First Amendment).

[236] *Trinity*, 788 F.3d at 784.

[237] Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("[the statute] violated the Fourteenth Amendment, and [another] Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment").

[239] Shay, *supra* note 132, at 598.

[238] *J.E.B.*, 511 U.S. at 161 (Scalia, J., dissenting) (stating that religion would presumably be among the classifications deserving of heightened scrutiny) (citing Larson v. Valente, 456 U.S. 228, 244-46 (1982)).

Missouri's "high wall" argument would not pass muster under any standard above rational basis.

B. Adopting Justice White's Framework for an Equal Protection Analysis

If the Supreme Court does decide to analyze Article 1, Section 7 of the Missouri Constitution under the Equal Protection Clause, it should seek guidance from the framework Justice White articulated in his concurring opinion in *McDaniel*.[239] First, because this provision places an absolute prohibition on an entire classification of religious institutions from receiving state benefits—similar to how the Tennessee Constitution placed an absolute prohibition on clergy members from participating in Tennessee's constitutional convention[240]—the Court must ascertain the purpose behind the legislation by carefully analyzing the interests the state is attempting to advance through its enforcement.[241] Here, Missouri has made it clear that the purpose for this constitutional provision is to maintain as strict of a separation between church and state as possible.[242] It argued that this longstanding state tradition of maintaining a "high wall" of separation has prevented impermissible entanglement issues that could arise from the government distributing public tax dollars to religious institutions.[243]

Second, the Court must analyze the classification scheme created by the provision.[244] Here, Missouri's constitutional provision that prohibits *all* churches and religious institutions from receiving state aid establishes two broad classifications: 1) religious institutions and 2) non-religious institutions. Because the purpose of this provision advanced by the state is to prevent all potential entanglement issues between church and state, if the Court adheres to Justice White's analysis in *McDaniel*, it would have to determine whether this wholesale exclusion of religion sweeps too broadly to serve that purpose.[245] In evaluating the classification schemes that are

---

[239] *McDaniel*, 435 U.S. at 643.

[240] *Id*. at 645.

[241] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341, 346 (1949) [hereinafter "Tussman"].

[242] *Trinity*, 788 F.3d at 784.

[243] *Id*. at 783.

[244] *McDaniel*, 435 U.S. at 645.

[245] *Id*.

created when a statute treats different individuals differently, there are several situations that may arise, and the Court will analyze each one to determine whether the legislation is constitutional.

If the provision creates a class that is overinclusive, it would mean that individuals and institutions are being excluded from a public benefits program where their inclusion would not result in detriment to the interest being advanced by the state.[246] If the classification is a perfect fit, it would mean that the state has created a scheme that effectively includes all of the individuals and institutions in the program that would not cause a detriment to the state's interest and has excluded the parties that would cause the state detriment in achieving purpose of the legislation.[247] The closer the classification comes to becoming a perfect misfit, meaning that the classification scheme includes or excludes too many individuals that should or should not be placed in the classification, the more likely the Court will find the provision to be unconstitutional.[248]

Finally, the Court must determine whether the classification is suspect, requiring the Missouri Constitution to be scrutinized under a heightened standard of review than rational basis.[249] If the Court determines that a religious classification in this context is a suspect class, then the Court will apply strict scrutiny, placing the burden on the state to demonstrate that the provision is narrowly tailored to advance a compelling state interest.[250] If the Court rejects an application of strict scrutiny and instead chooses to apply an intermediate standard of review, it will require the state to prove that the absolute prohibition of religious organizations from receiving state aid is substantially related to an important governmental objective.[251] If the Court rejects applying at least some level of heightened scrutiny, it will apply rational basis which would uphold the absolute prohibition against religion so long as the prohibition is rationally related to the legitimate government interest.[252] For the reasons stated above, strict scrutiny should be applied in this case.

---

[246] *Id*.

[247] Tussman, *supra* note 241, at 347-49.

[248] Tussman, *supra* note 241, at 351.

[249] *City of New Orleans*, 427 U.S. at 303.

[250] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (defining strict scrutiny).

[251] Heckler v. Mathews, 465 U.S. 728, 744 (1984) (defining intermediate scrutiny).

[252] See Williamson, 346 U.S. at 488.

C. The Analysis of Article I, Section 7 Under Each Standard of Review

Under strict scrutiny, even if it is conceded that maintaining a strict separation of church and state is a compelling state interest, a blanket prohibition against the distribution of funds to religious organizations is not narrowly tailored to achieve that compelling interest. The provision in the Missouri Constitution sweeps too broadly,[253] prohibiting state action that will never result in entanglement issues. In other words, the classification that this provision establishes is overinclusive because even though there are many examples where distributing state funds to churches for certain purposes would cause the precise entanglement issues that the state is attempting to avoid, there are just as many instances where excluding churches from these public benefits programs would not advance the interests of the state. For example, Trinity argued that a literal reading of the Missouri Constitution would prohibit churches from receiving public benefits from state police and fire departments, even if they were called to the church to respond to emergency situations because these departments are funded by taxpayer dollars and its action in a church would technically be classified as distributing public aid to a religious organization.[254] It also contended that such a broad prohibition would allow the state to enact legislation that would permit high occupancy vehicles to have certain toll charges waived while crossing bridges but exclude church buses from receiving that same benefit.[255] Although Missouri's Department of Natural Resources adequately rebutted these extreme hypotheses,[256] if the state could deny a religious organization a scrap-tire grant, it is not so farfetched to believe that states might try to expand that holding to other common benefits as well.

When the Founders expressed concerns over the federal government endorsing the beliefs of a particular religion, they certainly could not have believed that *all* interactions between state actors and religious institutions would constitute the sponsorship of

---

[253] *See McDaniel*, 435 U.S. at 645 (White, J., concurring).

[254] Brief for Petitioner, *supra* note 17, at 37-39.

[255] Brief for Petitioner, *supra* note 17, at 39.

[256] Brief in Opposition for Writ of Certiorari at 9-10, *Trinity*, 788 F.3d 779 (8th Cir. 2015) (No. 15-577).

religion.[257] It is not likely that the early American Colonies would have feared that a church's participation in a state-funded scrap-tire grant program would have resulted in a symbolic union between church and state. If this were the case, then there does not seem to be a single instance where it would be permissible for a church in any state to receive any form of public benefits or state aid.

Although Missouri may have an interest in preventing the commingling between church and state in some instances, it should not be able to exclude qualified religious organizations from participating in *all* public benefits programs. The Eighth Circuit in *Trinity* failed to recognize that churches have historically been an integral part of society in bringing communities together and providing a safe haven for society's most troubled individuals. More importantly, the people who worship in these churches and bring their children to these religious daycare centers have a constitutionally protected right to do so. Excluding a church from a public scrap-tire program for no other reason than the fact that it is a church does nothing more than restrict the ability of families attending the church to allow their children to fully enjoy their experience on a safe playground.

Even under an intermediate standard of review, the "wholesale exclusion" of religious organizations from public benefits programs would not be substantially related to the important government interest of preventing the commingling of church and state. Although prohibiting churches from participating in some benefits programs might be substantially related to that interest, a blanket prohibition against participation in all programs cannot be substantially related to advance that interest. For example, if a public assistance program was distributing public funds to help renovate existing buildings for qualified organizations, there would likely be an issue if a church was able to receive these funds and build a new campus or repair an outdated sanctuary. Likewise, if state funds were distributed directly to individuals to help train them to become members of the clergy, then this exclusion of religious institutions from the benefits program would be more than justified.[258] However, these types of situations have not been presented in this case and it is clear that preventing a church from resurfacing the playground of a

[257] *See Agostini*, 521 U.S. at 233.
[258] *See Locke*, 540 U.S at 712.

child daycare center cannot be construed as having a substantial relation to an important government interest of preventing entanglement issues between church and state.[259]

It is clear that under either heightened standard of review, Missouri's historic interest in maintaining a high wall between church and state would not be enough to satisfy a Fourteenth Amendment Equal Protection analysis. It is critical to emphasize the fact that even if a regulation is valid under one provision of the Constitution, that regulation must be struck down once it violates another provision.[260] In *Trinity*, even though the lower court held that the challenged legislation did not violate the First Amendment Establishment Clause, it does not mean the Court can ignore the fact that the Fourteenth Amendment's Equal Protection Clause was violated.[261] Had the Eighth Circuit fully analyzed Trinity's claim and placed Equal Protection at the forefront of the analysis, and applied any standard of review above rational basis, Trinity would have likely won the case because it is clear that placing a blanket prohibition on qualified religious institutions from participating in an entirely secular recycling grant program sweeps too broad.[262]

Although the Eighth Circuit affirmed the application of rational basis to Trinity's Equal Protection Clause claim because it could not find a violation of the First Amendment religion clauses,[263] the Supreme Court likely will not apply traditional rational basis in this case. Rational basis is a test that is typically reserved for classifications bases on age, wealth, sexual orientation, or disability status,[264] whereas religion, although rarely brought up in the context of Equal Protection discussions, will likely be deserving of receiving heightened review.[265]

The Court has in fact used strict scrutiny to evaluate state action which places restrictions on an individual's First Amendment

---

[259] *See Trinity*, 788 F.3d at 793 (Gruender, J., dissenting in part) ("[A] this stage of the litigation, I cannot conclude that the Department's concern about direct funding for a rubber playground surface translates into a historic and substantial antiestablishment concern.).

[260] *See Hunter*, 471 U.S. at 233.

[261] *Id*.

[262] *See* McDaniel, 435 U.S. at 645.

[263] *Trinity*, 788 F.3d at 788-89.

[264] *See supra* note 180 and accompanying text.

[265] *J.E.B*., 511 U.S. at 161 (Scalia, J., dissenting) (stating that although not at issue in the case, religion would presumably be among the classifications deserving of heightened scrutiny).

right to freely exercise his or her religion.[266] For example, in *Church of the Lukumi Babaku Aya*,[267] the majority of the Court applied a strict scrutiny standard to strike down an ordinance which prevented members of the Santeria religion from partaking in rituals that required the slaughtering animals as sacrificial offerings to their God.[268] Even though the ordinance was facially neutral and did not mention the Santeria religion, a review of the legislative history of the ordinance made it clear to the Court that members of the local church were specifically being targeted for their beliefs.[269] It stated that only in the rarest cases would a "law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation . . . survive strict scrutiny."[270] However, despite the Court's recognition that this type of state action is invidious at its core, it routinely disposes of Equal Protection arguments under a rational basis standard of review whenever the First Amendment tests have been satisfied.[271]

The Court rarely proceeds with an Equal Protection analysis after it has already evaluated a religion case under the Establishment and Free Exercise Clauses. Therefore, if the Court engages in an Equal Protection analysis and applies *any* level of heightened scrutiny, it is very likely that it will conclude that the wholesale exclusion of religion from public benefits programs does not serve to advance the interests of the state, and only results in the type of invidious discrimination prohibited by the Constitution.

VII. CONCLUSION

This Nation was founded on a guarantee that an individual's religious liberty would be zealously protected by the U.S. Constitution.[272] Although the Supreme Court has overwhelmingly ensured that these fundamental rights have not been encroached upon by the state, some individuals and religious organizations fall victim

---

[266] *See Church of the Lukumi Babaku Aya*, 508 U.S. at 520.

[267] *Id*. at 522.

[268] *Id*. at 520.

[269] *Id*.

[270] *Id*. at 546.

[271] *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).

[272] CHEMERINSKY, *supra* note 50.

to an analytical framework failing to provide them with justice.[273] These unfortunate outcomes are the result of the Court's longstanding tradition of engaging exclusively in First Amendment analyses whenever religious issues are present—utilizing tests which have been criticized as providing inadequate and inconsistent results[274]—and failing to address state conduct that potentially violates the Equal Protection Clause of the Fourteenth Amendment.[275]

In instances where the state refuses to allow qualified churches and religiously affiliated individuals to participate in generally available, secular public benefits programs, even when it is conceded that issuing the funds would not result in impermissible entanglement issues,[276] the Court must treat the type of action as invidious discrimination, as the state is excluding these qualified participants solely on the basis of religion.[277] As Justice White has explained, reviewing this type of discrimination under an Equal Protection framework would help to identify serious constitutional concerns since the classification scheme created by the state is overinclusive,[278] failing to advance the purported legitimate interests of the state.

If the Court upholds Missouri's absolute prohibition of distributing state aid to religious organizations, under any constitutional theory, the results could be dire. Although the extreme hypotheticals proposed by Trinity would never likely become reality, especially given the state of the current political climate, a holding in favor of Missouri could arguably give states an opportunity to begin strengthening the wall between church and state.[279] Upholding Missouri's constitutional provision would be a significant departure from the Court's increasing willingness to accept and overlook the naturally occurring interactions that arise between religious organizations and state agencies when public aid programs are implemented to help children receive the best education possible.[280] Furthermore, it would certainly give states the opportunity engage in

---

[273] *See Trinity*, 788 F.3d at 793 (Gruender, J., dissenting in part).
[274] *See Lamb's* Chapel, 508 U.S. at 398 (Scalia, J., concurring).
[275] *See McDaniel*, 435 U.S. at 643 (White, J., concurring).
[276] *Trinity*, 788 F.3d. at 784.
[277] Wirzburger v. Galvin, 412 F.3d 271, 284 (1st Cir. 2005).
[278] *See McDaniel*, 435 U.S. at 645.
[279] *See* Brief for Petitioner, *supra* note 17, at 37-39.
[280] *See generally Zelman*, 536 U.S. at 639; *Zobrest*, 509 U.S. at 1; *Everson*, 330 U.S. at 1.

the type invidious discrimination against religion which is prohibited by the Fourteenth Amendment.

As Justice Stevens has proclaimed, "*There is only one Equal Protection Clause*."[281] If the Supreme Court properly invokes it to evaluate the absolute prohibition of religious organizations from being afforded an opportunity to receive the same benefits as their next door neighbor, it will certainly provide justice the parents and children who call *Trinity* their home.

[281] *Craig*, 429 U.S. at 211.